of Foong Onn Kwan, his Originating Summons would still not be maintainable.

Mr. Mahendran's other objection, namely as to Procedure, also appears to be well founded. He cited *Odgers,* On Pleading (10th Edition) pages 11 and 12 but this passage apparently refers to Order 54 r. 1 of the English Rules and not Order 55 r. 3 which corresponds with our Section 467 (i).

Reference to *Daniell's,* Chancery Practice, (8th Edition) Vol. 1, page 865 and of the cases there referred to makes it clear that this Procedure by way of Originating Summons is not applicable to a case of this nature. What the Plaintiff is really asking is for a decision as to whether there was a valid trust by Foong Onn Kwan deceased in favour of the Plaintiff. Mr. MacDuff was unable to cite any authority to show that procedure by way of Originating Summons under Section 467 (i) was an appropriate form of procedure in such a matter and I am of opinion that his application is misconcieved, and that a Plaintiff cannot in an Originating Summons based on an alleged Trust ask for evidence to be heard to prove that Trust. Moreover the question at issue is a question of fact and not of law and will have to be determined in Open Court and is not suitable for determination by the procedure of an Originating Summons.

Accordingly the application is dismissed with costs but such dismissal will not operate to prevent the Plaintiff bringing some other form of proceedings to determine the points at issue.

Application Dismissed.

MUTHAN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J.) April 11, 1947]

Criminal Procedure Code (F.M.S.) Section 163 and 173—Duplicity of charges—Charge of Criminal Trespass—Penal Code, Sections 441 and 447.

The appellant in this case was convicted on the following charge. "That you on or about 4.1.47, at about 0600 hours did commit criminal trespass by unlawfully remaining in Athlone Estate cooly lines, Kapar, after having been discharged by the Assistant Manager of the said Estate with intent to commit an offence or to annoy the Assistant Manager of the said Estate and that you thereby committed an offence punishable under Section 447 (Cap. 45)." The main ground of appeal was that the charge was bad for duplicity.

Held, (1) that in this case the appellant was left in doubt at his trial as to whether the prosecution were alleging that he had unlawfully remained on the Estate with the intention of committing an offence or whether he had unlawfully remained there with the intention of annoying the Assistant Manager, and therefore the appellant must have been embarrassed at the trial.

(2) that as express provisions of the Criminal Procedure Code had been contravened and as the contravention was a matter of substance and not of form, the conviction must be quashed.

Cases referred to :—

(1) *Emperor v. Jaugi* I.L.R. 26 Allahabad 194.

(2) *Mahomed Humayoon Shah v. Regina* 21 W.R. 72.

(3) *Yap Liow Swee v. P. P.* (1937) 6 M.L.J. 225; (1937) F.M.S.L.R. 71.

MAGISTRATE'S APPEAL.

Willan, C. J. :—In this case the appellant was convicted by the Magistrate at Klang of the offence of criminal trespass punishable under section 447 of the Penal Code and sentenced to one month's rigorous imprisonment. The charge to which the appellant had to plead, and on which he was convicted, was framed in the following terms :—

> That you on or about 4.1.47 at about 0600 hours did commit criminal trespass by unlawfully remaining in Athlone Estate cooly lines, Kapar, after having been discharged by the Assistant Manager of the said Estate with intent to commit an offence or to annoy the Assistant Manager of the said Estate and that you thereby committed an offence punishable under section 447 (Cap. 45).

The appellant appealed against his conviction on several grounds, the main ground being that the charge was bad for duplicity.

Section 447 of the Penal Code punishes the offence of criminal trespass and that offence is defined in section 441 as follows :—

> Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.

In this case the latter half of the definition applies in that the appellant entered Athlone Estate lawfully, and the allegation against him was that he unlawfully remained there "with intent to commit an offence or to annoy the Assistant Manager."

It is clear from the definition of criminal trespass that the appellant could not be convicted of that offence unless he unlawfully remained on the said Estate with one or more of the intentions set out in section 441. The prosecution must prove such intention—see *Emperor v. Jaugi*[1].

Since this was a summary trial by a Magistrate reference should be made to section 173 (a) of the Criminal Procedure Code which governs summary trial by Magistrates. That section reads :—

> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked

whether he is guilty of the offence charged or claims to be tried.

Section 163 of the Criminal Procedure Code, which is equivalent to section 233 of the Indian Criminal Procedure Code, is as follows :—

> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

The object of section 233 of the Indian Code is explained by Jackson J. in the case of *Mahomed Humayoon Shah v. Regina*[2] :—

> The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed.

In the present case the prosecution, through the medium of one charge, left the appellant in doubt at his trial as to whether they were alleging that he had unlawfully remained on the Estate with the intention of committing an offence or whether he had unlawfully remained there with the intention of annoying the Assistant Manager. Accordingly the appellant must have been embarrassed at the trial.

The prosecution has only itself to blame for this, because section 166 of the Criminal Procedure Code provides for an accused person being charged in the alternative, and the prosecution could have framed alternative charges against the appellant, the first charge alleging that he remained unlawfully on the Estate with intent to commit an offence, and the alternative charge alleging that he did so with intent to annoy the Assistant Manager. There would then have been a definite finding whether the appellant was guilty on the first charge or on the alternative charge.

Since express provisions of the Criminal Procedure Code have been contravened, I hold, following the decision of the Federated Malay States Court of Appeal in the case of *Yap Liow Swee v. P. P.*[3] that this contravention "is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality".

Accordingly I allow this appeal and quash the conviction and sentence. I order the appellant to be re-tried before another Magistrate.

Retrial Ordered.

NG PENG CHOON v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Malayan Union, Murray Aynsley, C.J. Singapore and Brown, J.) April 3, 1947]

Criminal Procedure Code (F.M.S.), Section 198—Trial with Assessors—Trial Judge must agree with opinion of both assessors or of one assessor before he can give judgment—Johore Courts Enactment, Section 75.

In this case the appellant was convicted of murder and sentenced to death. After the summing up of the learned trial Judge, both the assessors gave their opinions that the accused was guilty of murder. The learned trial Judge stated that he did not disagree with those opinions. On the record of the trial there was the following note by the trial Judge. "Both Assessors return a verdict of guilty of murder, a verdict with which I do not disagree."

Held, that by virtue of Section 198 (i) of the Criminal Procedure Code there must be positive agreement between the Judge and the opinion of both assessors or of one assessor, as the case may be, and the record of the trial must show this.

CRIMINAL APPEAL.

A. N. Mitra for the appellant.

McCall for the Public Prosecutor.

The judgment of the Court of Appeal was given by :

Willan, C. J. :—In this case the appellant was convicted in the State of Johore of murder and sentenced to death.

After the summing-up of the learned trial Judge, both the Assessors gave their opinions that the appellant was guilty of murder. The learned trial Judge stated that he did not disagree with those opinions. On the record of the trial there is the following note by the learned trial Judge :—

> Both Assessors return a verdict of guilty of murder, a verdict with which I do not disagree.

By section 75 of the Johore Courts Enactment (Cap. 54) and the Schedule thereto, the Criminal Procedure Code of the Federated Malay States is law in that State. Section 198 of that Code is as follows :—

> 198 (i) If the Court agrees with the opinion of both Assessors, or where the Assessors are of different opinions with the opinion of one Assessor the Court shall give judgment accordingly.
>
> (ii) If the Court is unable to agree with the opinion of both Assessors, or of the one remaining Assessor as provided by section 188, the proceedings shall be stayed and a new trial held with the aid of fresh Assessors.

It is clear from the wording of sub-section (i) of that section that there must be positive agreement between the Judge and the opinion of both Assessors or of one Assessor, as the case may be, and the record of the trial must show this. In this case the record does not disclose any such positive agreement; it merely discloses